United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2100

ORIGINAL

To be argued by
FREDERICK P. HAFETZ

B P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

FORREST GERRY, JR. and RICHARD PERRY,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF DEFENDANT-APPELLANT FORREST GERRY, JR.

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UNITED STATES OF AMERICA, :

Appellee, :

DOCKET NO. 74-2100

-against- :

FORREST GERRY, JR. and RICHARD PERRY, :

Defendants-Appellants :

- x

BRIEF ON BEHALF OF DEFENDANT-APPELLANT FORREST GERRY, JR.

PRELIMINARY STATEMENT

Defendant-appellant Gerry appeals from the judgment of conviction entered in the United States District Court for the Eastern District of New York after trial (Honorable Orin G. Judd and a jury) on July 19, 1974.

The indictment (73 Cr. 1068) charged defendants-appellants Gerry and Perry, together with twenty-six others, with influencing the outcome of harness races by bribery 18 U.S.C. §224 (count one) and conspiracy to influence the outcome of harness races by bribery, 18 U.S.C. §224 (count two). The charges against six of the defendants were severed prior to trial and the remaining twenty-two defendants were tried together. During trial a motion for severance by one of the twenty-two was granted. Of the twenty-one defendants then remaining, all but Gerry and Perry were acquitted either

by the court upon motion for judgment of acquittal or by the jury. Gerry and Perry were each convicted of both counts.

Gerry was sentenced on each count to concurrent prison terms of four years; additionally, he was fined $10,000 on each count. Execution of sentence was stayed pending appeal.

STATEMENT OF FACTS

THE GOVERNMENT'S EVIDENCE

Michael Shagan, vice president of New York City Off-Track Betting Corporation (hereinafter "OTB"), testified that a betting pool on a Superfecta race is one in which the bettor must select the first four horses in the exact order (511, 521).* He stated that OTB no longer had Superfecta betting but did during the period January 24 - April 13, 1973 (522). There were three denominations of Superfecta bets: $3; $18, known as "key box" and $72 (522). To win a $3 bet, the first four horses must finish in the exact order selected by the bettor (523). In the $18 bet, the bettor selects four horses and designates one of the four to finish first; he does not have to select the exact finishing order of the other three horses that he selects (524). There are six possible combinations of these other three horses as to second, third and fourth positions (524). In the $72 bet, the bettor takes four horses in all possible combinations without selecting the order in which they will finish; there are 24 combinations of finishing orders for the first four horses in an eight horse race (524). If two

*References, unless otherwise noted, are to the trial transcript.

horses are left out of the betting and only six horses are boxed, 15 $72 tickets must be bet to cover every combination (582).

Noting that he was not an expert on horse racing or handicapping, the witness defined a large bet as $1,000 or more and said that big bettors would tend to place their bets at OTB rather than at the racetrack because of the limitations at the latter locations on the size and number of bets that could be placed at one time by one bettor (871, 925). Discussing the odds on possible numbers of winning Superfecta combinations, Shagan stated that in an eight horse race, there were 1,680 possible combinations of four horses; that a reduction of the number of horses in the race to seven reduced to 840 the possible number of combinations of four and a reduction of the number of horses in the race to six reduced to 360 the number of possible combinations of four. Betting - or boxing - at $3 per bet, all combinations of four horses in an eight horse race would cost $5,040 whereas boxing all combinations of four in a seven horse race would cost $2,520 and in a six horse race, $1,080 (927-8). The average amount of winning Superfecta tickets in 1973 was $3,000 (916). On the basis of this average payoff, a person who boxed only six horses and bet all combinations of four therein would win money if the two horses not boxed finished out of the first four (916-20a). Newspaper handicappers often leave out at least three of the eight horses in a Superfecta race (878).

On cross-examination Shagan testified that between January 24 and April 13, 1973, the average amount bet daily on Superfecta races at OTB offices was between $200,000 and $300,000 (869-70). The total number of printouts - a computer statement of all betting action at one window of an OTB branch - for Superfecta races during this period was approximately 56,000 (975-6). Of these, Shagan brought to the government for analysis between 500 and 1,000 of which 205 were offered into evidence by the government (940-1, 975-6).

As to OTB records he had turned over to the F.B.I., Shagan testified on cross-examination as follows:

> "Q. Isn't it a fact, Mr. Shagan, that you and the people in OTB when you came to be shown that any gambler who wanted to invest $1,080 could have a winning ticket in Superfecta by eliminating two horses, which were the pigs in the race, that he could have an excellent chance of winning the Superfecta?
>
> * * *
>
> A. ...that is the mathematics, we knew that from the beginning.
>
> * * *
>
> Q. ...isn't it a fact that what you told that [grand] jury on the 14th of May [1973] at page 24:
>
> 'Whether it is great handicapping or fixing, it is not something we can tell from our records.'
>
> And isn't it true today as it was true when you said that on the 14th day of May last year to the Grand Jury?
>
> A. It certainly is true that the records I have referred to cannot indicate whether there is any handicapping or fixing, these records don't go far enough." (918-9, 920-920a; emphasis added).

Nicholas D. Gianturco, a Special Agent with the F.B.I., testified that beginning in March or April, 1973, the F.B.I. began reviewing multiple cashings of winning Superfecta tickets (1090). This search was conducted by examining I.R.S. Form 1099's which persons cashing winning tickets were required to fill out (1090). These forms listed the OTB numbers assigned to these tickets. The witness defined a multiple cashing as the cashing by one or more persons of tickets purchased in a consecutive punch of tickets from the same branch and window (1090-1, 1122).

The F.B.I. then ordered printouts - a computer statement of all bets at a particular window for a particular day - from those windows at which multiple winning tickets were purchased (1091). Additionally, the F.B.I. received the "daily branch settlement sheets" of all OTB branches for every day regarded as "pertinent" (1124); these sheets showed the number of tickets and monetary value of these tickets for each window of each branch (1124). From these latter sheets, the F.B.I. arbitrarily determined which windows had large Superfecta "punches"; the witness regarded a large Superfecta punch as occurring, generally, where more than $3,000 was bet at a window on one day (681-2).* The F.B.I. then ordered the printouts from those particular windows showing large Superfecta punches (1125). A total of 800 printouts were ordered (1126). These 800 printouts revealed 40 races of "large groups of Superfecta

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*Pages 673 to 876 of the trial transcript contain a voir-dire examination of Gianturco out of the jury's presence.

bets being made" in demonstrable betting patterns of which "approximately 30 of them were winning days ... [and] 10 of them were losing days" (1089, 1129).

The F.B.I. then prepared 40 separate charts setting forth certain information as to these 40 races (1129-30). The bulk of Gianturco's testimony concerned these charts which were admitted into evidence over defense objection (723-4, 835, 1114-17).

On voir-dire and cross-examination of Gianturco about the general method of selection of printouts from which the charts were prepared, the following testimony was elicited. There were 89 Superfecta races between January 1 and April 13, 1973, the period covered by the indictment, of which charts were prepared only for 40 (1680). The bets depicted on the chart do not represent any OTB Superfecta bets other than large bets which occurred in 40 of the 89 races (1570), nor do the charts in any way depict information about betting at the track itself (1685). There were certain races depicted on the charts as to which "the defense can make a certain argument" and which "the prosecution would like to forget" (1684-5).

Further, after extensive cross-examination, Gianturco altered his earlier testimony on the number of winning and losing days on the 40 charts - instead of 30, there were only 22 or 25 winning days, and instead of 10, there were 15 or 18 losing days (1676-7). The total amount bet in the large bets depicted

on the charts was between $1,000, 000 and $1,250,000; the total amount won on these bets was approximately $2,250,000 (1679).

Regarding the specific 40 races for which charts were prepared and introduced into evidence (government exhibits 306-332, 345-365), the witness stated that these races exhibited a certain betting pattern in which at various times, certain horses were bet to finish out of the first four, to finish in the first four or to finish at particular positions in the first four (1089-90).*

Gianturco was cross-examined extensively on these 40 charts and the betting patterns exhibited in them (1155-1744). He testified that in these 40 Superfecta races involving eight drivers in each,** there were betting patterns on various of the driver-defendants on 84 occasions.

In all but 17 of these 84 occasions, the betting pattern was consistent with the actual odds on the horses. Thus, in 58 instances, horses on which the odds were against finishing in the first four were left out of the horses bet to finish in the first four.*** In another 9 of these 84 occasions, horses

*Of these 40 races, the government's bill of particulars set forth the particular races in which a driver-defendant was allegedly bribed. The bill of particulars adhered to the betting pattern about which Gianturco testified. Thus, if the alleged pattern was that the driver-defendant would finish in the first four in a particular race, he was designated in the bill of particulars as being bribed in that particular race; similarly, if the alleged pattern was that the driver-defendant would finish out of the first four in a particular race, he was designated in the bill of particulars as being bribed in that particular race.

**On several occasions horses were scratched so that only seven horses started in those races.

***These 58 instances consist of the following races set forth in the charts: February 2, 3 (2 drivers), 8 (2 drivers), 10, 13 (2 drivers), 14 (2 drivers), 17 (2 drivers), 21 (2 drivers), 22, 24 (2 drivers), 26 (3 drivers), 28; March 1 (2 drivers), 2 (3 drivers), 5 (2 drivers), 8, 10 (2 drivers), 16 (3 drivers) 20 (2 drivers), 21 (2 drivers), 22 (2 drivers), 26, 29 (2 drivers), 30 (2 drivers), 31 (2 drivers); April 3 (2 drivers), 4 (2 drivers), 5, 7, 10 (2 drivers), 11 (3 drivers).

which the odds favored to finish in the first four were included in the horses bet to finish in the first four.* And in 7 of these 9 instances, the horses bet to finish in the first four were, according to the odds, the first or second favorites.

Of the remaining occasions as to which Gianturco testified that betting patterns existed, the betting pattern was inconsistent with the odds: in 16, horses favored to finish in the first four were bet to finish out of the first four;** in one, a horse not favored to finish in the first four, was bet to finish in the first four.*** In five of these seventeen occasions, the horses finished consistent with the odds, hence, the betting patterns were losing ones.****

Thus, in only twelve of the eighty-four occasions in which the charts allegedly demonstrated a betting pattern was there a pattern which was both inconsistent with the odds and consistent with the results. These, as noted, supra, all involved instances of horses which were favored to finish in the first four, but were bet out of the first four and actually finished out of the first four. In three of these twelve occasions, the horses in question "broke" during the race; this means that through no fault of the driver the horse went off

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*These 9 instances consist of the following races set forth in the charts: February 2, March 2, 5, 8, 13, 29; April 3, 6, 10.
**January 30 (2 drivers); February 5, 6, 13, 27, 28; March 2,9, 10, 14, 26, 31; April 4, 5, 6.
***March 26.
****February 5, 6, 28; March 26, April 6.

stride (1280, 1316-18, 1406-8). Harness racing rules require a driver to pull back a horse that "breaks" (1406-8). In another of these twelve occasions, the horse favored to finish in the first four, finished in the same exact time as the horse finishing fourth but lost by a nose (1385). In yet another of these twelve occasions, the horse favored to finish in the first four had been scratched in its previous race, ten days earlier, because of lameness; a handicapper knowing this fact, conceded Gianturco, could have "a reasonable question" whether the horse was still lame in the race in question (1504-7).

Dr. Arthur Yaspan testified that he had a doctorate degree in applied mathematics (6160). He stated that he had been hired by the prosecution to make a statistical study of all Superfecta races at Yonkers and Roosevelt Raceways in 1972 (6166).

On cross-examination, he was unable to state whether a good handicapper could "beat" the races (6213-4, 6358). Finally, asked whether, based on his study, he could beat the races, Dr. Yaspan answered "probably" (6352-3, 6457).

Testimony of Harness Race Drivers

Allen Cantor, a harness race driver, named in the bill of particulars as a co-conspirator, and testifying under a grant of immunity, stated that on January 24, 1973, he had a discussion with defendant Gerry near Roosevelt Raceway about a Superfecta race that evening in which Cantor was going to

drive one of the horses (133, 136, 196). Gerry requested Cantor to "finish out of the super" and told Cantor that if he did so, Gerry would give him a ticket on the winning combination or a thousand dollars (138-9). Cantor told Gerry that he preferred to take the thousand dollars (139). Cantor's horse finished seventh in the Superfecta race that evening (139). The next day Gerry gave Cantor $800 (143).

On cross-examination regarding this race, Cantor testified that the odds against his horse winning were 16 or 17 to 1, the longest odds against any horse in the race and that he actually tried to win the race (169-72). He also testified that Gerry had not asked him to finish out of the first four in the race, but that Gerry had said that he would give Cantor money if Cantor finished out of the first four (171-2). Cantor conceded that he had not done anything to earn the $800 and stated that he did not know whether Gerry was joking about paying him money (173, 176).

Cantor further testified, on direct examination, about a subsequent conversation with Gerry, approximately several days later, in which Gerry asked what Cantor's chances were in a forthcoming Superfecta race in which Cantor was scheduled to race (143, 145). Cantor replied that he thought that he would be "in the money and there was another horse in the race that I didn't like" (145). Cantor acknowledged that this was just handicapping information and that there was nothing improper about giving this information to Gerry (145, 224). Gerry offered

no money for this information and Cantor received no money for it (211).

Additionally, Cantor testified on direct about a conversation with Marvin Proman, named as a co-conspirator in the bill of particulars, on March 20, 1973, about a horse Cantor was scheduled to drive in the Superfecta race that evening at Roosevelt (147). Proman was the trainer of that horse (182). Asked what Proman said, Cantor testified: "To lead with the horse and by doing so he wouldn't have made the top and said if I finished out of the Super, we'd split a thousand dollars" (157). The horse finished last; a few days later at Roosevelt Raceway Proman gave Cantor $500 (157).

On cross-examination regarding this March 20, 1973 race, Cantor testified that Proman had not told him to lose the race; that Proman's instructions "to go to the top" were good instructions which a trainer would have given if the trainer wanted to win that race; that Cantor actually tried to win that race (182, 184, 231).

Testifying in regard to his discussions with the F.B.I. and prosecutors prior to trial, Cantor stated that in his initial discussion he did not advise the government about his meetings with Gerry and Proman (193). The government promised him that if he was truthful, he would not be indicted and would be able to continue racing until the trial of this case (197-8, 206). Even after these promises, in his next meeting with the government, Cantor did not relate the

conversations about which he testified on direct examination (195-6); instead, he told the government that the money he received from Gerry was for payment of money owed by Gerry to Cantor for services performed by Cantor five or six years previously when Cantor worked for Gerry as an assistant trainer (135, 206-210). Not until a later meeting with the government did Cantor set forth the conversations about which he testified on direct examination (194-8, 206-10).

During Cantor's testimony, the prosecution, at defense counsel request, informed the court that it had not yet advised the New York State Racing Board of Cantor's statements to it, although it had attempted to do so the previous evening (219-23).

Randolph Perry, a harness driver, named in the bill of particulars as a co-conspirator, testified that in late March, 1973, he had the following conversation with defendant Gerry near Roosevelt Raceway (239-40). Gerry asked Perry how his chances were in a Superfecta race that evening in which Perry was going to drive (240). After Perry replied that he thought he "had a good shot," Gerry stated "that's too bad because if you didn't like him [Perry's horse], I could hit the Superfecta" (240-1). Gerry then said, "Do you want to make a thousand dollars" and Perry said "no" (241). Gerry then stated that he 's only kidding around and just wanted to see how honest Perry was (241). That was the only time he ever spoke to Gerry (241).

Joseph Michael Pullman, a co-defendant whose case was severed prior to trial, testified pursuant to a grant of testimonial immunity (6432). On April 16, 1974, during the trial of this case, Pullman visited the office of Gerry's attorney, Edward Bobick, Esq., and advised Bobick and Gerry, who was there at that time, that the prosecution was making improper and coercive remarks to several witnesses in the case, including himself (7285-6). Bobick requested that Pullman record his next conversation in the prosecutor's office and Pullman did so on April 18, 19 and 21;* Pullman brought these recordings to Bobick's office (6902-3, 6907-9). Recorded on these tapes are: Michael Pollack and Harold Meyerson - prosecutors in the case; several F.B.I. agents; Kraft, Rothstein and Pullman (6902-3).

Pullman testified that these tapes contain a discussion in which Kraft was told by Pollack that he would get a suspended sentence in his pending case (6892). Kraft had previously told Pullman that he had "made a deal and ... was going to walk away scot free" (6987). The tapes contain statements by the F.B.I. advising Pullman what answers to give at trial (6943). Other statements on the tape were an F.B.I. statement that Pollack and the trial judge had discussed what drivers were to be included in the indictment (6985-6), and statements by Pollack that "he's got ... [Judge Judd] in his hip pocket" (6735) and that Judge Judd wrote a letter in support of Pollack's admission to the bar (7298).

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*The trial judge had transcripts made of these tapes during the trial and marked the transcripts as court exhibits 5-9 (9002-6). The transcripts are set forth in the joint appendix of defendants Gerry and Perry, pp. D1-219.

Marvin Proman, a harness racehorse trainer, testified that in January, 1973, he saw defendant Gerry in Michael Sherman's Carvel Motel room near the Yonkers Racetrack (7795).* After Proman denied that Sherman had ever "made him an offer" regarding where horses trained by Proman should finish in races, the prosecutor read grand jury testimony by Proman stating that Sherman had asked Proman to offer $500 to Alan Cantor to finish out of a Superfecta race (7807); Proman acknowledged giving this testimony (7808).

Asked whether Sherman gave him money for Cantor and whether Proman then gave money to Cantor, Proman testified that he did not (7811-2). Proman acknowledged giving grand jury testimony that Sherman gave him $500 for Cantor and that he, Proman, then asked Cantor if Cantor wanted $500 to finish out of the first four and Cantor said "Yes" (7811-13). Proman said that he gave this testimony under "threat of indictment, duress and suspension" (7814).

Proman also acknowledged giving grand jury testimony that Sherman told him he was working for Gerry and that he, Sherman, got a "percentage" for introducing Perry to Gerry" (7823). However, Proman stated that this grand jury testimony was not true (8043-5, 8049).

The witness acknowledged giving grand jury testimony that Sherman told him that the money he gave to Proman for Ross and Cantor was Gerry's money (7839). However, Proman

*Sherman was named as a co-defendant but his case was severed prior to trial. He did not testify at trial.

also recanted this testimony (7839).

Proman denied that Sherman told him that he spoke to Proman on orders from Gerry (7883). The prosecutor then read an F.B.I. interview with Proman in which Proman had stated that Sherman had told Proman that he spoke to Proman on orders from Gerry (7884). Proman did not recall making this statement.

Asked whether at the time of his arrest in California several days previously on a fugitive warrant for failure to appear in court pursuant to a subpoena, he had a piece of paper on his possession with Gerry's telephone number, Proman explained that Gerry had written the number and given it to Proman (7979). At the time Gerry had done this, Proman was about to travel abroad to buy horses and Gerry was interested in purchasing horses from Proman; in 1973, Gerry bought from or sold to Proman six horses (8026, 8032). Acknowledging that he was in California from January 15, 1974 to May 11, 1974, Proman denied telling anyone that he received funds during this period from Gerry or Sherman (7969).

Proman testified that he "always felt" that his grand jury testimony was "untruthful" (7921). In October or November, 1973, at his initial questioning by the F.B.I. in this case, he was told that he would be indicted unless he gave certain information (7996-9). The F.B.I. told him that if he cooperated, they would go to the Harness Commission and attempt to prevent his suspension (7999). In the grand jury he received signals from Hal Meyerson regarding certain questions (8006). F.B.I.

agent Fanning and Meyerson suggested to Proman that he mention Ross' name in his testimony (8003-4).

Proman further testified that Gerry was very knowledgable of horses, one of the "finest trainers" and a good handicapper (8042-3).

Jerry West, an F.B.I. agent, testified that he arrested Proman in California the previous week (8117). At that time, Proman said:

> "he testified truthfully before the grand jury before, without an attorney and when all his friends in New York had gotten attorneys, and went before the grand jury and lied. He was out of the harness racing business, and they were still in it" (8121).

Proman also told West that "someone suggested I should take a vacation" (8150).

Thomas R. French, an F.B.I. agent, testified as to prior statements by Proman to him in October, 1973 (8160-1). Proman at that time stated that in regard to a January 24, 1973, Superfecta race, Sherman told him that horses driven by Alan Cantor and co-defendant Ross were "dead," and that he had ten winning tickets of which he gave eight to Sherman (8163-4), that he had seen Perry and Gerry in Sherman's Carvel Inn Motel room (8164, 8167), that he "knew Perry to be a bookmaker" (8166), that he "considered Perry to be the money man behind the Superfecta" (8167), and that Insko had incurred heavy losses in a land deal and "was trying to recoup these losses in the

Superfecta. He said that he did not think that Mr. Insko was doing anything in any other race than the Superfecta" (8167-8).

In a November, 1973 interview, Proman told French that "he was approached by Michael Sherman and was told that if his horse would finish out of the top four positions, he would get $1,000" or a winning Superfecta ticket, and that if cash was selected, it would be paid prior to the race whereas if a ticket was selected, it would be given after the race (8173-4). In this same interview Proman stated that pursuant to an agreement between Sherman and Proman, Proman had offered $500 to Ross to fix a race" to which Ross said "no ... the boys around the track were getting "$1,000 and that he wanted $1,000 also" (8175-6). Proman also stated that he then advised Sherman of Ross' statement and Sherman "okayed Mr. Ross to receive the full $1,000" (8179).

THE DEFENSE

Seymour Rothstein, who previously testified in this trial as a government witness, was called as a defense witness by co-defendant Perry. Rothstein testified that some of the answers he had given in his trial testimony were false (8298). He stated that he had told the F.B.I. and the prosecutors that he did not know Perry but that one of the prosecutors, Mr. Pollack, had instructed him, "You go along and say that you know the man" (8299). He also said that his testimony that he saw co-defendant Cormier in a certain Raceway Motel room and that he had seen Gerry talking to co-defendant McNutt were

false statements made at the insistence of the prosecutor (8300). He explained that the reason for his false testimony was that the prosecutor had threatened to use his influence with the court to obtain a five year jail sentence for him if he did not cooperate (8301).

In regard to his testimony about Gerry and Insko, he stated that also was false (8302, 8309).

Rothstein further testified that on one occasion he was present in the prosecutor's office when Randy Perry, named as a co-conspirator and a government witness in this case, was present (8307). Perry left the office, stating to F.B.I. agent Fanning: "I'm not going to say these things on the stand what you want me to say because it's not true" (8307-8).

In regard to his grand jury testimony, he said that he received signals from Meyerson (8310).

On cross-examination, Rothstein was asked if he ever expressed fear for his personal safety during this case; he said that he had not (8375).

The prosecutor then asked Rothstein if prior to his trial testimony, payments from the government to him as a re-located witness stopped (8390). Rothstein acknowledged that they did stop (8390). At this point, over defense objection, the prosecutor, Pollack, was permitted to read to the jury the following document sent by him to the Department of Justice:

"Termination of subsistence for
Seymour Rothstein.

> Pursuant to my [Pollack's] conversation with Hopeburn (sic) on February 3, 1974, please terminate subsistence for Seymour Rothstein at once. This request is made because the witness has left his area of relocation and returned to his home, and can no longer be considered secure" (8394-5; government exhibit 527; emphasis added).

George Levy, president of Roosevelt Raceway, testified regarding the cessation of Superfecta betting at Roosevelt on April 13, 1973, as follows:

> "Q. Would you please tell this Jury and this Court how that came about and who caused the cessation of the Superfecta betting?
>
> A. In about February when Yonkers was running, the Supers were paying off more than I anticipated.
>
> At that time, more or less on account of that, with only eight horses in a race made it very easy for an experienced handicapper with money to do pretty well with access to them. Therefore we proposed in the New York State Harness Commission that we have a double Exacta which would involve 16 horses, would be safer.
>
> At that time there wasn't the slightest talk of corruption or anything wrong. I checked with Howard Samuels, the head of OTB, and he liked the idea and we filed that application with the New York State Harness Racing Commission ...
>
> I'm afraid of what a good handicapper with ample funds can do ...
>
> * * *
>
> ... Let's make this point very plain, Counselor, as of the time I called it [the Superfecta races] off, it was not on account of any thought of corruption, no evidence of corruption, no talk of corruption at all on the part of the driver. I did it for the purposes I have explained in the report ...
>
> * * *

Q. Mr. Levy, I was wondering if you might explain a bit more to the Jury what you mean by a good handicapper with a lot of money would be able, in a sense, to beat the Supers; would you explain that a bit more?

A. Well, you only have eight horses in the race. It costs $1,080 to buy six.

Now, in the payoffs, they are over $3,000, and it is obvious if you can pick the races once in three times you are either even or slightly in front.

Now, a good handicapper is not like a person who would -- simply take two horses that were the long-shots in the race, he might figure one of those two long-shots by virtue of a prior record or history of the charts show he had bad position, he was interferred with, and what-not; he might not eliminate one of those 2 long price horses and he might use them in his selection.

So I am saying, a good handicapper, having a full knowledge of the record, having seen him race on numerous occasions, in my opinion would have a tremendous advantage over some poor lady coming in, a housewife betting $3.00 in the Super and she's picking only two or three dollars one bet and building up the pool ...

* * *

Q. But it was the State of New York, through Off-Track Betting, that provided the betting pattern facility to do what was done with regard to the Supers?

A. Oh, yes.

(8445-6, 8448, 8450, 8453-6).

Milton D. Taylor, director of racing at Yonkers Raceway, a former presiding judge at various racetracks, testified that he viewed both the actual Superfecta races at Yonkers in January and February, 1973, and later the films of those races, and in his opinion, as an expert, there was no improper conduct by any driver except for one driver who was not a defendant at trial (8608-10).

ARGUMENT

POINT I

DEFENDANT GERRY WAS DENIED A FAIR TRIAL.

A. Insubstantial Nature of the Case against Gerry.

After an eleven week trial of twenty-two defendants in which 89 witnesses testified for the government, defendant Garry and Perry were convicted of conspiracy to influence Yonkers Raceway and Roosevelt Raceway harness races by bribery (count one of the indictment) and influencing Yonkers Raceway and Roosevelt Raceway races by bribery (count two of the indictment). However, the length of the trial and the number of witnesses is not indicative of the evidence relevant to Gerry. Although viewed in the light most favorable to the government, the evidence against Gerry is sufficient, analysis of this evidence reveals considerably less than a strong case against Gerry.

This section of Point I, herein, discusses the various aspects of the government's proof against Gerry and the infirmities of this proof. Viewed against these infirmities, the highly prejudicial prosecutorial misconduct and erroneous rulings by the trial court, discussed hereunder in Point I, sections B-J, effectively denied Gerry a fair trial and mandate a reversal of his conviction.

1. Betting Patterns.

Superfecta races, in existence at Yonkers and Roosevelt Raceways during the period of the alleged conspiracy, were

eight-horse races in which the bettor had to select the first four horses in order to win.* The indictment charged a conspiracy to bribe and actual bribery of drivers in various Superfecta races at Yonkers and Roosevelt Raceways from January to April, 1973. The indictment included as defendants thirteen drivers alleged to have been bribed.

A substantial portion of the government case, based primarily on testimony of Michael Shagan, vice president of Off-Track Betting Corporation (hereinafter referred to as "OTB") and F.B.I. agent Nicholas Gianturco, attempted to establish a Superfecta betting pattern of numerous bets made at OTB offices, totaling sizeable amounts of money, which bets left out certain horses from those selected to finish in the first four. Other testimony, viewed in the light most favorable to the government, established that persons making these bets did so, directly or indirectly, on information from Gerry. Gianturco testified that the total amount bet in these betting patterns during the period in question was approximately $1,250,000 and the gross total amount won on these bets was $2,250,000 (1679). The inference argued by the government from these facts - and charged by the court to the jury as a permissible inference (10,000) - was that a conspiracy to commit sports bribery existed between the persons making these bets, including, of course, Gerry, and the driver-defendants selected to finish out of the first four.

Cross-examination of Gianturco wholly negated the

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*The testimony of Michael Shagan, Statement of Facts, supra, pp. 2-4, sets forth the costs of various Superfecta bets, the odds against selecting a winning combination, and average winning payoffs.

unjustified inference argued by the government and sanctioned by the court in its charge. As set forth in detail in the Statement of Facts, supra, pp. 6-9, cross-examination of Gianturco elicited that of 40 Superfecta races for which he had found patterns, there were a minimum of fifteen, and possibly as many as eighteen, races in which the result on these pattern bets was a loss of money. Cross-examination further revealed that in the overwhelming majority of times in which the betting pattern selected particular horses to finish out of the first four, the betting odds - available to all bettors - also favored these horses to finish out of the first four.

In addition to the Gianturco cross-examination, cross-examination of other government witnesses further negated the inference of fixed races which the government attempted to draw from the betting patterns. Defense counsel questioned these witnesses on whether the winnings of the patterned bets could be attributable to good handicapping rather than bribery. Thus, Shagan, on cross-examination, conceded that the government records on betting patterns did not "'indicate whether there is any handicapping or fixing'" (920-920a). Shagan further testified as follows:

> "Q. Isn't it a fact that, Mr. Shagan, that you and the people in OTB when you came to be shown that any gambler who wanted to invest $1,080 could have a winning ticket in Superfecta by eliminating two horses, which were the pigs in the race, that he could have an excellent chance of winning the Superfecta?
>
> A. ...that is the mathematics, we knew that from the beginning" (918-9).

And, Dr. Arthur Yaspan, called by the government as an expert

witness on mathematical probabilities, acknowledged that he, based on his study of Superfecta races at Yonkers and Roosevelt Raceways, could "probably," in a legitimate manner, "beat the races" (6352-3).

Finally, George Levy, president of Roosevelt Raceway, called as a defense witness, pointedly testified to the well-grounded fear of racetrack officials, prior to the time that any allegation was made of bribery in Superfecta races, that a good handicapper with a lot of money could win a sizeable amount of money in these races (8445-50).

Thus, the government's reliance at trial on betting patterns to establish bribery of harness drivers was vitiated by its own witnesses, as well as the defense witness, Levy, and the evidence of betting patterns was wholly consistent with the defendants' innocence. On analysis, this evidence was, as submitted in Point I, B, infra, irrelevant and therefore erroneously admitted.

2. "Ten Percenters".

An extensive portion of the government case consisted of testimony by persons - known as "ten percenters" - who cashed winning Superfecta tickets which had been purchased from OTB offices by Gerry and other persons on Gerry's behalf. Persons cashing such tickets are required to complete and verify an Internal Revenue Service Form 1099 which states that a false statement made thereon is a violation of 26 U.S.C. §7206(2). The act of procuring other persons to cash winning tickets on

horse races and to fill out the Internal Revenue Service Form 1099 is, of course, a violation of 26 U.S.C. §7206(2). United States v. Maistrow, 451 F.2d 1342 (2d Cir. 1971). But evidence of this violation - a common practice by racetrack gamblers - in no way constituted evidence of sports bribery.

3. Testimony of Harness Race Drivers.

Two harness race drivers testified at trial. Alan Cantor testified on direct examination about a discussion with Gerry in which Gerry stated that he would give Cantor money to finish out of the first four in a Superfecta race and further testified that Gerry gave him money the next day (138-9, 143). Cantor's credibility was severely attacked on cross-examination (see Statement of Facts, supra, pp. 10-12). In exchange for his cooperation the prosecution had promised Cantor that he would not be indicted and that it would not advise the New York State Racing Board of his conduct until the time of trial so that Cantor would be able to continue racing until that time. Further, not until after several meetings with the prosecutor, did Cantor make any statement about alleged discussions he had with Gerry (194-8, 206-10).

The second driver, Randolph Perry, testified that Gerry asked whether he wanted to make a thousand dollars in a race in which Perry was scheduled to race and Perry said "no" (241). Gerry then told Perry that he was joking (241).

The testimony of Cantor whose credibility was sharply challenged and the equivocal Randolph Perry testimony was the only driver testimony presented by the government.

4. Testimony of Co-Conspirators.

The government elicited testimony from three non-driver, alleged co-conspirators - David Kraft, Joseph Pullman and Seymour Rothstein - regarding conversations with Gerry in which Gerry discussed bribing drivers. Additionally, a fourth non-driver, alleged co-conspirator, Marvin Proman, testified as to conversations with Michael Sherman in which Sherman allegedly told Proman that, on instructions from Gerry, Sherman was giving Proman money to bribe drivers. Unusual circumstances rendered all of this testimony subject to substantial doubt.

As to Pullman and Proman, they had inculpated Gerry in prior grand jury testimony. At trial they recanted their grand jury testimony and so the government introduced, as evidence-in-chief, their grand jury testimony. Rothstein, after testifying for the government, appeared as a defense witness and recanted substantial portions of his earlier testimony. Thus, at trial, three of the government's main witnesses repudiated earlier testimony incriminating Gerry.

As to Kraft, his direct examination testimony was that he gave money to Gerry for betting on Gerry's representation that he was bribing drivers. This testimony was badly damaged by cross-examination which drew from Kraft the admission that Kraft may have been the victim of a Gerry tout scheme in which Gerry obtained betting money from Kraft on the false pretense of bribing drivers but actually had no intent of bribing drivers. The prosecution then attempted to rehabilitate Kraft on re-direct examination. Subsequent revelations at trial established that

the rehabilitation was the product of prosecutorial misconduct.

The misconduct came to light through tape recordings made by Pullman during trial on April 18, 19 and 21, prior to his appearance as a government witness. Recorded were: the prosecutors - Michael Pollack and Harold Meyerson; several F.B.I. agents; Kraft, Rothstein and Pullman.* These taped conversations and the prosecutorial - F.B.I. misconduct will be discussed fully in subsequent sections of this brief. The significance here is to point out that the credibility of a key government witness - Kraft - was tainted by prosecutorial misconduct, and that the fortunate occurrence of these tape recordings casts a long shadow on the credibility of the entire prosecution case.

5. Alleged Post-Conspiracy Statement by Gerry.

F.B.I. agent Hilly testified to recording, with Kraft's consent, a conversation in August, 1973, between Kraft and Gerry in which Gerry stated that he had given bribes to drivers. Viewed in the context of the defense contention, to which Kraft himself appeared to accede on his cross-examination, that Gerry had been touting Kraft, this statement by Gerry is entirely consistent with that defense.

6. Summary.

Shrunk to its true dimensions, the case against Gerry

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*As noted on page 13, supra, transcripts of the recordings were made by the court and marked as court exhibits. The transcripts are set forth in defendants' appendix, pages D1-219.

is based on the testimony of relatively few witnesses. This testimony was dominated by recantations and credibility lapses, and was in part manipulated by prosecutorial misconduct. Indeed, examination of the tape transcripts raises the specter of misconduct permeating the entire proceedings.

It is against the background of these infirmities in the government's evidence, that Gerry's specific claims of denial of a fair trial, discussed below, must be viewed. Unlike the appeal of an overwhelming evidence case which pales isolated claims of error, the evidence here, upon analysis, is not so substantial as to overcome the highly prejudicial erroneous rulings and prosecutorial misconduct in this case. Many of the claims here are individually sufficient to warrant reversal of Gerry's conviction. Moreover, the coalescence of so many prejudicial errors mandates reversal. In the most fundamental sense, Gerry was denied a fair trial.

B. Erroneously Admitted Evidence of Betting Patterns.

A substantial portion of the government case was devoted to testimony and charts of betting patterns in an attempt to establish, circumstantially, bribery of drivers by Gerry. This evidence was admitted over defense objection (1113-6). The court erred in admitting it because, as noted above, this evidence was not probative of a bribery scheme.

Moreover, this evidence was most confusing. Indeed, the trial judge himself, out of the jury's presence, acknowledged that, in regard to this evidence: "[t]here is so much criss-cross I can't keep it all straight" (3493). If the court had

difficulty here, how could jury focus on the central issue of bribery not have been hindered by this welter of complex evidence?

Admission of this confusing, irrelevant evidence constituted prejudicial error which denied Gerry a fair trial.

C. Prosecution Attempts to Connect Gerry to Organized Crime.

The prosecution theory in this case was that Gerry was the central figure in a scheme to bribe drivers in Superfecta races and that Richard Perry was the key figure in implementing this scheme in Brooklyn as well as a major financial backer of Gerry. The prosecution attempted to establish that the activities of the two were intertwined; prosecution witness Cussell testified that Gerry and Perry were in daily telephone contact to discuss betting plans.

Throughout the trial, the prosecution strove in a calculated, reckless manner, to depict Perry as a member of the Mafia, and to stress the significance to Gerry of having a Mafia member head the Brooklyn activities of the alleged scheme. These prosecution efforts succeeded not only in fatally infecting the fairness of the proceedings in regard to Perry, but to Gerry as well because of the evidence closely connecting him to Perry.

1. Kraft and the Pullman Tapes.

On Friday, April 19, 1974, Kraft testified on direct

examination about giving substantial amounts of money to Gerry on Gerry's representation that he was betting this money on Superfecta races he had fixed. He further testified that he had won money in this betting. In a devestating cross-examination Kraft was forced to concede that he actually "lost money" on his Superfecta betting with Gerry during the alleged conspiracy and that Gerry had lied to him numerous times during this period (4425, 4619, 4649-50). Finally, asked whether he was a victim of a tout scheme, Kraft acknowledged: "I was a victim of something" (4650).

Hurting from the impact of this cross-examination, the prosecutor and the F.B.I. huddled with Kraft in the prosecutor's office that afternoon, Friday, April 19, to plan the rehabilitation of Kraft on re-direct examination scheduled for April 22. Fortunately, present was Pullman wearing a concealed recorder; Pullman was scheduled to testify the following week.* After conceding the damaging effect of cross-examination of Kraft, the prosecutor and F.B.I. agents reviewed possible avenues of rehabilitation. At one point Kraft himself suggested a line of questioning for re-direct examination which was promptly rejected by the prosecutor (App., D 70).

At this point, F.B.I. agent Fanning suggested a stunning, inflammatory come-back for Kraft, as follows:

> "Fanning: Let me ask you, Mike ... Do you think he was touting Richard Perry? and the Varios? Do you think the jury could buy that he was touting the Vario people?

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*The transcript prepared by the trial court of this meeting is set forth in defendants' appendix, pp. D55-107.

Pollack: He was touting the Vario people already.

Fanning: Oh, come on, they don't know the Vario people? The people in the jury box.

* * *

Fanning: ... Vario's been in and out of the papers for two years ... the Gold bug" (App.,D.70-1).

In the transcript of a taped conversation in the prosecutor's office on April 21, between Pollack, Pullman and Rothstein, Pollack refers to the "Gold bug" as occurring in Canarsie and states that Paul Vario, co-defendant Peter Vario's father is a Mafia member and was "shamed in the underworld as a result of the 'Gold bug'"(App. D. 204-5). Defendant Gerry respectfully submits that this Court can take notice of the widely-publicized media accounts of the "Gold bug" - noted by Fanning.* The "Gold bug" refers to an electronic surveillance device placed in a trailer in Canarsie by the office of Kings County District Attorney Eugene Gold pursuant to court order; during the course of this electronic surveillance conversations of Paul Vario were overheard. Manifestly, Fanning, with the prosecutor at his side, was suggesting to Kraft rehabilitation by testifying that since the Mafia was betting on Gerry's information, and Gerry would not dare to tout the Mafia, Gerry therefore could not be directing a tout scheme.

And, following this repugnant scenario, violative of the most minimal concept of a fair trial, the cooperative and pliable Kraft, testifying on re-direct examination, acted out

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*Interestingly, although minimal evidence was presented against him and he was acquitted by the jury, co-defendant Peter Vario is the lead name in the instant indictment.

the fabricated script. He stated:

> "The second reason I didn't think I was in any tout scheme was that when Mr. Pullman told me about Mr. Perry, he also added that Mr. Gerry was betting with Mr. Perry, who is connected with a fierce mob in Brooklyn ...
>
> * * *
>
> and I felt that Mr. Gerry wouldn't want to play tout schemes with people like that" (4925-9; emphasis added).

Re-cross examination of Kraft established that although he had made many numerous prior statements to the F.B.I. during the course of this case including prior statements about Perry, he had never stated that Perry was "connected with a fierce mob" nor made any equivalent statement (4937-8, 4954-60).

Completing this sordid scene, Kraft, who was unaware of the tape recordings at this point, on further re-cross examination, denied that he had any discussions about the case with the prosecutor on April 19 after he had completed cross-examination (4874-82). And, the prosecutor, also unaware at this time of the existence of the tapes, represented to the court, at a bench conference, that his only discussion with Kraft after court on April 19, was his statement to Kraft that he must explain why he did not think there was a tout scheme; the prosecutor denied that any answer had been suggested to Kraft (4900-2).

In a trial where Kraft's credibility was so critical, this gross prosecutorial-F.B.I. misconduct, fabricating evidence of a most inflammatory nature to the detriment of both Perry and Gerry so prejudiced Gerry as to necessitate a reversal of the conviction.

2. Exploiting the "Fierce Mob" Testimony.

Having concocted the "fierce mob" rehabilitation of Kraft, the prosecution played this theme to the hilt in the most inflammatory manner.

Later in the trial, during Pullman's testimony, the prosecutor asked Pullman whether he had a conversation with Gerry about Perry and Pullman replied that he could not recall such a conversation. Then, reading from an F.B.I. 302, the prosecutor, over strenuous defense objection, asked:

> "... did you tell the F.B.I. that Richie whose last name you didn't know but who Gerry on several occasions referred to as the son of a made man in Brooklyn, wears glasses, used black horn-rimmed ..." (6836-44, 6853-4).

Although Pullman denied using the term "made man" (6854), the clear connotation in the statement - that Gerry had a Mafia partner in the alleged scheme - was incalculably prejudicial.* No basis whatsoever existed for permitting the prosecutor to ask the question. The prosecutor's alleged reason was that this 302 statement "bears direct relationship to the ["fierce mob"] statement which Mr. Kraft says was related to him by Mr. Pullman" (6839). There was no minimum, good faith offer of proof whatsoever by the prosecution to the effect that - assuming in the first instance that Pullman had made this statement to the F.B.I. - Pullman had related this information to Kraft. Clearly, this was a most specious claim by the

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*It is respectfully submitted that the term "made man" is a well-known term connoting membership in the Mafia.

prosecution to disguise a ploy to exploit the prejudicial Mafia implication introduced during Kraft's testimony.

Compounding this prejudicial effect of its questioning of Kraft and Pullman, the prosecutor then elicited from F.B.I. agent French, over defense objection, testimony that one of the government witnesses had identified Perry as "a bookmaker from Brooklyn" (8166). Again, no basis existed for introducing this gratuitous information.

Finally, demonstrating the gross prosecutorial misconduct in its characterization of Perry as a Mafia member, highly prejudicial to both Perry and Gerry, is the fact that in statements recorded by Pullman on April 21, the prosecutor stated in his office that Perry was "not a made guy" (App. D204), that Perry's father was "not in the Mafia" (App. D203), that co-defendant Vario was "not a made guy" (App. D204); the prosecutor further stated that co-defendant Peter Vario's father, Paul Vario, who did not have any connection with this case, was"a big man" (App. D203). Thus, the prosecutor not only injected most inflammatory accusations into the trial, but even believed some of those assertions to be false.

D. The Court's Rulings and Comments Relating to the Pullman Tapes.

1. Denial of the Request to Re-Call Kraft for Cross-Examination.

Kraft completed his testimony on April 23. The next day, defense counsel, in camera, revealed to the court the existence of the Pullman tape recordings made on April 18, 19

and 21 and turned the tapes over to the court.* In this session trial counsel for Gerry advised the court that the reason that existence of the tapes had not yet been disclosed at trial was because Pullman believed the government had pending an application for immunity for him and feared disclosure of the tapes might jeopardize this application. Indeed, the tape transcripts reveal that Pullman requested immunity in regard to the pending sports bribery charge against him rather than having to plead guilty to this charge. Thus, for sound reason, while Kraft was still on the witness stand through April 23, defense counsel did not utilize the tape recordings to cross-examine him.

Thereafter, while the government was still presenting its direct case, defense counsel requested that Kraft be recalled for further re-cross examination based on the tapes (5351-66, 6386-7, 8247-8, 8971-2). The court acknowledged the "serious effect" that the tapes might have on the credibility of Kraft (5285) and stated:

> "I am particularly concerned about the indication in there [the tapes] that Mr. Kraft's statement about the mob in Brooklyn may have been inspired by something that the F.B.I. told him, and I think defendants should have an opportunity to bring that out at an appropriate time, if it is a fact" (5920; emphasis added).

Notwithstanding its concern about the potential damaging effect of the tapes on Kraft's credibility, the court denied defendants

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*The six page transcript of this in camera session was sealed at the time. It is included in the trial transcript filed as part of the Record on Appeal.

the opportunity during the government's case to recall Kraft for further cross-examination and advised defense counsel that "you can put in any case you want" (8348).

Surely, there was no prejudice to presentation of the government's case in granting the defense request to recall Kraft to interrogate him on the suggestive statements in the tapes. The government's direct case continued for several weeks after the defense disclosure to the court of the tapes. With so much time left in the government's case, an interruption for re-cross examination of Kraft would not have upset the orderly presentation of proof by the prosecution.

Although the court stated that the defense should have "authenticated" transcripts of the tapes prepared (6386-7), the meaning of the court's requirement here was unclear. Pullman testified to taping the conversations (6902-3). The prosecutor conceded that he had conversations in his office with Kraft at the time that Pullman later said the recordings were made (4878). The court itself had transcripts made of the tapes. While the defense did seek admission of the tapes themselves into evidence, the defense requests as well encompassed utilization of the transcripts to question Kraft (5362-7, 6386-7, 8247-8). The court permitted examination of Pullman and Rothstein based on the transcripts.

Gerry had a clear right to have Kraft recalled for cross-examination based on the recordings that appeared to affect materially Kraft's credibility. The court's limitation that to utilize the recordings in regard to Kraft, the defense itself had to call Kraft as a witness, erroneously cast a burden

of proof on the defense. Further, this ruling erroneously required the defense to vouch for Kraft's credibility by calling him as their own witness. In sum, the court's refusal to permit cross-examination based on the Pullman recordings constituted reversible error.

Moreover, the unfairness of this erroneous ruling became even more prejudicial to Gerry during the court's charge. The court instructed the jury that it could infer:

> "that the defendants would not have found anything more favorable in the case than was contained in the portions of the rough transcripts which they used in cross-examination of individual witnesses" (10,024).

Thus, not only was Gerry denied the opportunity to cross-examine Kraft on material damaging to his credibility, but he was affirmatively prejudiced by the harmful conclusion drawn by the court which was based upon the court's own erroneous refusal to permit Gerry to elicit this damaging material.

2. The Court's Adverse Comments on the Pullman Tape Recordings.

Pullman testified as to the circumstances leading to his recording conversations in the prosecutor's office. He stated that on April 16, at the office of Gerry's counsel, Edward Bobick, he advised Bobick and Gerry who was present there that the prosecution had been making improper and coercive remarks to him during the course of preparing him to testify (7285-6). Bobick requested him to wear a recording device to tape these improper statements and Pullman did so. On April 18, 19 and 21, he recorded, at various times, the prosecutors

Pollack and Meyerson, F.B.I. agents including Fanning and Walsh, and witnesses Kraft and Rothstein (6902-3, 6907-9).

Subsequent to this testimony the following colloquy occurred in the presence of the jury. Defense counsel requested an instruction "that there is nothing illegal or wrong or criminal by Mr. Pullman following Mr. Bobick's advice, and wearing ... his own tape recorder" (7260). The court then stated "I am not sure about that" (7260). The prosecutor added "[t]hat is exactly right" (7260). Defense counsel objected to these statements whereupon the court stated: "Well, by my saying I am not sure, doesn't mean its wrong. It means I am not sure its right" (7260). The next day, in remarks to the jury, the court further expressed doubt about the legality of the tapes noting that "any questions" he had in this regard did not relate to the issues in this case" (7278).

And, in its charge to the jury, the court stated:

> "You should consider the motives Mr. Pullman may have had in carrying a tape recorder after he had talked with one of the defendants and his attorney ..." (10012, emphasis added).

Thus, in its statements to the jury regarding Pullman's recording of conversations in the prosecutor's office, pursuant to counsel for Gerry's request, the court strongly implied to the jury impropriety and possible criminality in these actions. This implication obviously applied to Gerry since he was present when his attorney requested Pullman to wear the recorder.

These statements, highly prejudicial to Gerry, constituted reversible error. Since the recordings were made with the consent of one of the participants to the discussion recorded,

they were, of course, not violative of the Fourth Amendment or the eavesdropping laws [United States v. White, 401 U.S. 745 (1971); 18 U.S.C. 2511 (2)(d)]. Nor were the recordings violative of the attorney-client privilege; the prosecutor was surely not the attorney for the witnesses it presented in this case. And in any case, the privilege, assuming it existed, is that of the client and Pullman here waived any such privilege. Neither the trial judge nor the prosecutor cited any provision of law which Gerry, his counsel or Pullman allegedly violated in having the recordings made. Clearly, the recordings were lawful.

Indeed, if not for the fortunate occurrence of these recordings, the prosecutorial and F.B.I. misconduct would never have been exposed. This misconduct was acknowledged by the prosecutor out of the presence of the jury (5360) and found "very disturbing" to the court (6973).

Yet, for lawfully gathering this evidence of prosecutorial misconduct by means of the Pullman recordings, Gerry ended up being penalized at trial by the court's disparaging statements to the jury about the making of these recordings. Surely, this was an unjust result, not only depriving Gerry of a fair trial, but antithetical to the true administration of justice.

One can only speculate how quickly the government would have launched an investigation and utilized concealed recording devices where allegations were made against a defense attorney of improprieties similar to those Pullman related to Gerry and Bobick. But what is good for the goose is also good for the gander. A defendant whose counsel acts quickly to ferret out prosecutorial misconduct should not be punished for this by adverse comment from the judge. Invocation of the court's

prestige in implying to the jury criminality in the lawful and - from the standpoint of the criminal justice system, salutory - recordings made at the behest of Gerry and his counsel immeasurably prejudiced Gerry and denied him a fair trial.

E. Rothstein "Fear" Testimony.

Continuing to exploit the unmistakable implications by the prosecution earlier in the trial that organized crime was involved in the alleged bribery scheme, the prosecution elicited testimony that its witness Rothstein had been in fear while this case was pending. Admitted over vehement defense objection, this testimony obviously implied that defendants - particularly Gerry since he was the alleged mastermind - had threatened Rothstein. No basis whatsoever existed for introducing this evidence and its admission fatally infected the fairness of the proceedings.

After Rothstein had testified as a defense witness and partially recanted his earlier trial testimony, the prosecutor on cross-examination, asked him if he had ever expressed fear for his safety during this case; Rothstein denied saying this (8375). Under the guise of impeaching Rothstein's denial, the prosecutor over defense objection (8390-1), was permitted to read to Rothstein a memorandum written by the prosecutor, Michael Pollack, to the Department of Justice on February 3, 1974, one month prior to trial. On that date Rothstein was receiving subsistence payments as a government relocated witness. The memorandum stated that Rothstein could "no longer be considered secure" since he

was moving back home from the area of relocation (8394-5).

And, further, in its rebuttal case, the prosecution over defense objection elicited testimony from Frederick Eder, Rothstein's probation officer, that in January, 1974, two months prior to trial, Rothstein had expressed fear for his personal safety (9016). Eder added: "I never questioned specifically on that point, but the implication was clear" (9018).

The court's rulings that the prosecutor's memorandum to the Department of Justice could be read to the jury and that Eder's testimony was admissible were erroneous.

To begin with, in regard to the memorandum, it contained no statement by Rothstein himself, but rather it constituted an out-of-court assertion by the prosecutor himself as to Rothstein being in jeopardy, an assertion doubtless impressive to the jury since it was made in an official memorandum to the Department of Justice. Moreover, the record reveals that at a bench conference, out of the jury's presence the prosecutor stated that at the time this memorandum was written, Rothstein had himself advised the prosecutor that "he no longer was in fear for his life" (8392). Thus, this memorandum implying that Rothstein was in jeopardy which the prosecutor read to the jury was - unknown to the jury - flatly contradicted by Rothstein's own statement to the prosecutor.

The court's ruling on the admissibility of this memorandum thereby permitted the very prosecutor trying this case to lend his credibility to the government's case by becoming a government witness - a witness who testified on a most prejudicial matter, who was not subject to cross-examination and whose

testimony as to Rothstein being in jeopardy was contrary to Rothstein's own assessment of his safety. Clearly this ruling was erroneous.

Next, there was no evidence presented by the prosecutor in any testimony elicited, or even in a minimum good faith offer of proof, that connected any defendant to a threat to Rothstein's safety. In United States v. Franzese, 392 F.2d 954 (2d Cir. 1968) vac. o.g. 394 U.S. 310, reh. den. 89 S. Ct. 1451 (1969) and United States v. Scandifia, 390 F.2d 244, 250 (2nd Cir. 1968), this Court approved admission of evidence of threats by a defendant to a witness to explain prior inconsistent testimony by the witness. Totally absent here was the predicate for admission of such evidence in Franzese and Scandifia - evidence connecting the threats to one of the defendants. In fact, Rothstein testified that he was a government witness in a "loan sharking" case (8353-4); fear for his safety may well have arisen from that case rather than the instant case.

Further, analysis of the time at which the fear statements were made renders their introduction here irrelevant. Rothstein's statement to Eder was made in January, 1974, and the prosecutor's memorandum was written in February, 1974. In March, while presumably, not "secure", Rothstein testified favorably for the government. There is no intervening statement of fear or renewal of the earlier expression of fear between Rothstein's testimony on the government's direct case and his appearance for the defense as a recanting witness. His earlier expression of fear was irrelevant to his recantation without proof of continued existence of fear on his part. No such proof was

offered by the prosecution.

Finally, the prosecutor, again over defense objection, fully exploited all of this prejudicial, erroneously admitted evidence of fear by quoting it in his summation (9906, 9908).

In conjunction with the prejudicial evidence admitted earlier in the trial which implied a Gerry connection with organized crime, the improperly admitted Department of Justice memorandum and the Eder testimony of Rothstein's fear for his safety were so prejudicial as to deny Gerry a fair trial.

F. Improper use of Prior Statements by Witnesses.

1. Grand Jury Testimony.

During the testimony of Pullman and Proman, both of whom were called by the government and recanted prior grand jury testimony, the government was permitted, over defense objection, to introduce as affirmative evidence grand jury testimony by these two witnesses. In United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964), this court approved the government's substantive use of the prior grand jury testimony of a witness inconsistent with the witness' testimony at trial. Although later decisions of this court followed the DeSisto ruling on grand jury testimony, the proposed, New Federal Rules of Evidence, Rule 801(d)(1) precludes use of any prior statement as evidence-in-chief unless the statement was made at a proceeding where cross-examination was permitted. At trial, defense counsel urged the proposed Rule 801(d)(1) as authority for exclusion of Pullman and Proman's grand jury testimony as substantive evidence but the court

followed the DeSisto holding (6436, 6440). In the light of the proposed new rule, defendant Gerry respectfully requests this Court to reverse the DeSisto ruling and hold that the grand jury testimony here admitted as substantive evidence should have been excluded.

2. Prior statements to the F.B.I.

In addition to questioning Pullman and Proman about prior grand jury testimony, the prosecutor questioned them extensively on whether they had previously made certain unsworn, oral statements to prosecutors and to the F.B.I. Upon their denial and lack of recall of these statements, the court over defense objection, permitted Dennis Dillon, Chief of the Department of Justice Organized Crime Strike Force, Eastern District of New York, and several F.B.I. agents to testify that Pullman and Proman made these prior statements. Notwithstanding the court's limiting instruction that this testimony was admissible not as substantive evidence but only for impeachment of Pullman's and Proman's credibility, admission of this testimony was erroneous.

In United States v. Cunningham, 446 F.2d 194 (2d Cir. 1971) this Court reviewed the government's use of prior, unsworn statements to impeach its own witnesses in a robbery case. Asked whether he had overheard a conversation in which the defendant had discussed dividing up a large sum of money, the witness Trumpler answered that he did not recall hearing this. The prosecutor then inquired whether Trumpler had told F.B.I. agent Swayze that he had overheard such a conversation and the witness denied making such a statement. The prosecutor then called agent Swayze to the stand and asked whether Trumpler had a prior conver-

sation with Swayze about Cunningham splitting up money. Although the agent answered "yes" before objection could be made, the trial judge (Hon. Edward Weinfeld), upon the objection, sustained it, struck the answer, and instructed the jury that it was not to consider the stricken testimony.

While approving the limited reference to the prior statement in the prosecutor's questioning of Trumpler, this court deemed as improper impeachment the interrogation of agent Swayze. Because of the trial court's prompt, curative instruction, there was no reversal. Recognizing that this type of impeachment was, under Nelson v. O'Neill, 402 U.S. 622 (1971), not violative of the Sixth Amendment right to confrontation, this court stated:

> "But there is no rule that anything should be admitted as evidence that constitutionally can. Our guide is still the principles of the common law as they may be interpreted by the courts of the United States by the light of reason and experience." United States v. Cunningham, supra, at 198.

Elsewhere in the opinion, the court, distinguishing the sanction in United States v. DeSisto, supra, of using prior sworn testimony before a grand jury, stated:

> "The risk of going further is illustrated by this case where, in addition to the dangers against which the hearsay rule is meant to protect, the issue whether the declarant ever made the statement requires resolution of a swearing contest between himself and the police." ibid. (emphasis added).

In United States v. Allsup, 485 F.2d 287 (8 Cir. 1973), the court there reversed a conviction on the grounds that:

> "The error was in permitting the government to extend the impeachment [of its witness] by

> placing into evidence through the local officers the out-of-court statements by ... [the witness] ... The trial court's instruction to the jury to limit its consideration of the evidence of prior inconsistent statements ... [by the witness] solely to credibility does not suffice to cure the evil." id. at 292.

The salutory principle of these cases precluding impeachment of prosecution witness by questioning government agents about prior statements made by these witnesses was grossly violated in this case. Although, as noted, the court below gave limiting instructions on the use of these prior statements, here, no more than in Allsup, did these instructions "suffice to cure the evil". ibid.

Specifically, during its direct examination of Pullman, the prosecutor inquired about a discussion Pullman had with Gerry in January, 1973. Pullman replied that at that time Gerry had requested him "to come to New York to bet Superfectas with him" (6461, 6481). After Pullman stated that a document shown to him by the prosecutor did not refresh his recollection, the prosecutor read the document, a memorandum from another prosecutor, Dennis Dillon, to the effect that Pullman had previously stated to Dillon that Gerry advised him in January, 1973, that he was going to try "to tie up" the Superfecta races at Yonkers (6479). The clear implication of this statement, in the context of the other prosecution evidence, was that in January, 1973, Gerry had announced a bribery scheme regarding the Superfecta races. Pullman denied making this statement (6479).

The prosecutor, Pollack, later called to the witness stand Dennis Dillon who the jury learned was the attorney in

charge of Pollack's office (7381). Over defense objection, Dillon testified that prior to trial Pullman had told him that Gerry stated in early 1973 that he wanted to "tie up" the Superfecta races and that he could "reach certain drivers" (7358-60, 7386-7). In addition to Dillon, the prosecutor also called F.B.I. agent Gianturco who testified that in June, 1973, Pullman had told him that earlier that year Gerry had expressed his intention to "tie up" the Superfecta races (7433-4).

Clearly, the trial court's permitting this impeachment of Pullman by the testimony of Dillon and Gianturco as to prior statements made by Pullman contravened the Cunningham ruling.

Similarly erroneous was the court's permitting impeachment of the credibility of prosecution witness Proman, a harness race horse trainer, by F.B.I. testimony as to prior statements made by him. On direct examination Proman denied making prior statements to the F.B.I. that: (1) Perry was the "money man" behind the alleged betting scheme; (2) Proman had discussed with Michael Sherman* certain drivers - co-defendants at trial - as being fixed; (3) Sherman gave money to Proman to bribe drivers and stated to Proman that he, Sherman, was acting on orders from Gerry (7830, 7963, 7969, 7884). In derogation of the Cunningham rule, the trial court, over defense objection, allowed F.B.I. agents West and French to testify that Proman had made these

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*Sherman was indicted in the instant case but the case as to him was severed prior to trial. He did not testify at trial.

statements (7271-8, 8165; see Statement of Facts, herein, pp. 16-17).

Thus, in the vital issues of the credibility of Pullman and Proman, the court below allowed the trial to degenerate to the exact situation against which this Court cautioned in Cunningham - "a swearing contest between ... [the prosecution witness] and the police". United States v. Cunningham, supra, at 198. The erroneous use here of impeachment testimony by law enforcement officials was highly prejudicial to Gerry. The prosecutor's extensive use of these statements by the witnesses unmistakably "appears to have been calculated to affirmatively aid the Government in establishing ... guilt". United States v. Miles, 413 F.2d 34, 38 (2d Cir. 1969).

3. Bad Faith Questioning as to Prior Statements.

In regard to a significant impeachment question asked of Proman by the prosecutor, which was extremely damaging to Gerry, subsequent F.B.I. testimony revealed that there was no basis for this question. The prosecutor asked Proman:

> "Q. ... did you ever tell anybody that you were receiving funds while in California from both Michael Sherman and Forrest Gerry, Jr.?" (7969).

Proman denied saying this (7969). Other evidence adduced by the prosecutor revealed that the prosecutor had requested Proman to be available as a witness at trial but that Proman had gone to California and was brought back to testify upon arrest in California by the F.B.I. (8117). Thus, the obvious and extremely

prejudicial implication of this question was that Gerry had attempted to prevent Proman from testifying.

Subsequently, during interrogation of F.B.I. agent West as to Proman's statements to the F.B.I. at the time of Proman's recent arrest in California, West testified, over defense objection:

> "I told Marvin [Proman] that had he gone to New York and testified that he wouldn't have been in the problems that he was in, and Marvin stated to me, 'Someone suggested I should take a vacation.'" (8149-50, emphasis added).

Neither in the testimony of agent West nor of agent French - the two witnesses called by the prosecutor as to prior statements made by Proman, nor, indeed, in the testimony of any other witness, is there any indication whatsoever that Gerry was sending funds to Proman while he stayed in California. In view of the extensive testimony admitted by the court - erroneously -as to prior statements by Proman, surely, if a statement had been made by Proman to this effect, the prosecutor would have offered it into evidence. The absence of such testimony renders insupportable the prosecutor's inflammatory question to Proman calculated to suggest to the jury that Gerry sought to prevent him from testimony. This question by the prosecutor and the answer elicited were indisputably prejudicial to Gerry.

4. Inadequacy of Trial Court's Limiting Instructions.

In United States v. Allsup, supra, the court found limiting instructions as to prior statements made by prosecution witnesses and admitted for impeachment use to be ineffective and reversed the conviction there. This ruling was fully consonant

with Mr. Justice Jackson's recognition that:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 332 U.S. 539, 559 (1949) (concurring opinion); see Jackson v. Denno, 378 U.S. 368, 389, f.n. 15 (1964).

Even more ineffective were the limiting instructions in the instant case. Here, the jury was given two sets of instructions as to prior statements by witnesses. As to prior grand jury testimony, the court instructed the jury that it could use this as affirmative evidence. As to prior statements to F.B.I. agents and prosecutors, the court charged that this could be used only for impeachment purposes. Doubtless the jurors were incapable of the "mental gymnastics" [United States v. DeSisto, supra at 933] required here and used the prior statements made to the F.B.I. as substantive evidence against Gerry.

In the face of this Court's sharp limitation of government use of prior, unsworn statements and its recognition of the dangers inherent where this hearsay rule is not scrupulously adhered to, the rampant hearsay testimony by government agents in the present case well makes a mockery of these limitations and requires a reversal of Gerry's conviction.

G. Erroneous Admission of Hearsay Statements by Michael Sherman.

Proman was a significant witness against Gerry. Attesting to his significance is the government's sending F.B.I. agents out to California during the trial to bring him back to New York. At trial Proman recanted his prior grand jury testimony, but, as discussed in the previous section of this brief, that

testimony was admitted as substantive evidence under the ruling of United States v. DeSisto, supra.

In his grand jury testimony, although relating no direct dealings with Gerry, Proman testified extensively as to dealings with Michael Sherman who advised Proman that he - Sherman - acted on behalf of Gerry (7823, 7839). Essentially, the Proman grand jury testimony was that at Sherman's request, Proman offered bribes to drivers, including Cantor who testified at trial, and that Sherman gave Proman bribe money to give to drivers (Statement of Facts herein, pp. 14-16).

Thus, Proman's testimony, highly damaging to Gerry, consisted essentially of hearsay statements made by Sherman. Sherman was named a co-defendant in the instant indictment, but his case was severed prior to trial; he did not testify at trial. Admission, over defense objection (7799-7800), of the extensive Proman grand jury testimony as to his conversations with Sherman was error.

In Geaney v. United States, 417 F.2d 1116, 1120 (2d Cir. 1969), this court stated that in ruling on the admissibility of hearsay statements in a conspiracy prosecution:

> "The judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom hearsay evidence is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with the other evidence ... If it has not, the judge must instruct the jury to disregard the hearsay" (emphasis added).

In Geaney the focus was on whether a defendant was sufficiently connected to a conspiracy by independent evidence

so as to render admissible against him the declarations of co-conspirators. The issue here is whether, where independent evidence established a defendant's participation in a certain conspiracy - with A and B, the statements by another party - C, were binding on the defendant. Surely, the Geaney test applies here to render inadmissible the statements by C unless C is proved by "a fair preponderance" of the independent evidence to be part of the A - B defendant conspiracy. Otherwise, once a conspiracy was established by a preponderance of the evidence, the government could submit to the jury the hearsay statements of anyone who said that he was acting on behalf of the alleged conspirators, even though there was absolutely no independent evidence to connect him with the conspiracy. Manifestly, if judicially sanctioned, this would be a most pernicious doctrine, in utter contradiction of Geaney.

Assessment of the independent, non-hearsay evidence as to Sherman reveals that the prosecution did not prove "by a fair preponderance of the evidence" Sherman's participation in the alleged conspiracy. Accordingly, the hearsay statements by Sherman to Proman was inadmissible.

Analysis reveals that the entire independent evidence as to Sherman's participation in the alleged bribe conspiracy consists of the following: (1) Proman testified that during the time period of the alleged conspiracy, he once saw Gerry in Sherman's motel room near Yonkers Raceway (7796); (2) during this same time period another witness, Lipkin, testified that he saw Perry in Sherman's motel room (4985); (3) records of a Holiday Inn in Westbury, Long Island, listed a "Michael Sherman"

as a guest there in March and April, 1973, and telephone company records during this period revealed a phone call from the room in which "Michael Sherman" was registered to a telephone listed to Richard Perry (6114-9).

As to (1) and (2), there was no testimony whatsoever that Gerry and Perry were ever in Sherman's motel room in Westchester County near Yonkers Raceway at the same time. In regard to (3) there was no testimony whatsoever that the same Michael Sherman about whom Proman testified was ever in that Holiday Inn room, or that this telephone call to the Perry telephone was made by the Michael Sherman in question - or, indeed, by any person named Michael Sherman. The prosecution acknowledged the lack of such evidence (6114-9).

However, even assuming that as to (1) and (2), Gerry and Perry had met in Sherman's motel room near Yonkers Raceway and that as to (3), the Holiday Inn telephone call was made by the same Michael Sherman whose statements are here in issue - both unwarranted assumptions even on the most favorable view of the government's proof - all that the government established in its proof aliunde as to Sherman is that Sherman called one co-conspirator, Perry, and that Perry and Gerry met in his room. Clearly, this evidence does not suffice under the "fair preponderance" test of Geaney to render admissible the very damaging hearsay declarations of Sherman. If the independent evidence here be deemed as a sufficient nexus between Sherman and the alleged conspiracy, then under this view, any person who is observed together with or talking on the telephone to two co-conspirators may himself be deemed a member of the conspiracy.

On analysis, the government contention that the proof aliunde established Sherman's participation in the conspiracy is reductio ad absurdum. The Sherman hearsay was erroneously admitted. Once admitted, it was effectively used against Gerry. The prosecutor cogently stressed this testimony in his summation (9942-9950). And, the court, in its charge, specifically instructed the jury that a bribery conviction could be based on it (10,005). Thus, the erroneous admission of this evidence denied Gerry a fair trial.

H. Erroneous Admission of Evidence of Gerry's Suspension from Harness Racing.

Over vehement defense objection, the court permitted the prosecutor to elicit from Charles Plumb, a harness racing judge employed by the New York State Harness Racing Commission who was called as a witness by counsel for several of the driver-defendants, that in April, 1966 Gerry's license as harness race driver, was suspended by the Commission for one week in 1966 for lack of financial responsibility (8728-37).

In urging the court to admit this evidence, the prosecutor argued that it was relevant to refute the defense contention at trial that Gerry's success in harness race betting during the alleged conspiracy was attributable to good handicapping. This argument, as was vigorously pointed out to the trial court by defense counsel, was specious. The suspension occurred seven years prior to the commencement of the alleged conspiracy. In no conceivable manner could that suspension be relevant to the charges here in question. Plainly the prosecutor

sought and obtained admission of this evidence solely for the prejudicial purpose of denigrating Gerry's character. Gerry, of course, had in no way put his character in issue. Admission of this evidence was therefore erroneous. See United States v. Deaton, 381 F.2d 114 (2d Cir. 1967); Michelson v. United States, 335 U.S. 469 (1948).

Furthermore, the court's admission of this evidence rendered as binding against Gerry in this trial, a finding of the Commission with no proof whatsoever as to the fairness of Commission procedures in making a determination - whether, for example, a hearing, and cross-examination and representation by counsel at such a hearing, were permitted.

Finally, taking no chances that the jury may have missed the prejudicial implication of this evidence, the prosecutor, over defense objection (8735), further elicited from Plumb the various grounds upon which the Commission may suspend a driver's license. Plumb testified that these included: conviction of a crime of moral turpitude; a finding of guilt of fraud in regard to racing; and a false material statement in a license application regarding prior arrests (8739-41). Thus, hearing that the reason for Gerry's suspension was viewed by the Commission on a par with these other serious derelictions, the jury was unmistakably affected by the evidence of Gerry's suspension. The jury may well have considered this evidence of Gerry's suspension as a euphemism for something sinister.

This erroneously admitted evidence, together with the other prejudicial error dominating this trial denied due process to Gerry and mandates a reversal.

I. The Prosecutor's Summation.

Together with the previously discussed improper comments by the prosecutor in his summation, additional erroneous statements render the summation, viewed in its entirety, so prejudicial as to require reversal of Gerry's conviction.

Specifically, the prosecutor argued to the jury that Gerry was responsible both for the government's difficulty in locating Proman and bringing him to testify at trial and for Proman's recantation of his prior grand jury testimony. The prosecutor, over defense objection, stated:

> "March the 11th, Marvin Proman is in New York. He talks to me with an attorney present. He goes over his testimony with me ... He goes back to California leaving me a phone number where he can be reached. And then Marvin Proman disappears.
>
> Ask yourself, who benefits by Marvin Proman's disappearance. Is it the Government who brought Marvin Proman back? Did we bring him back to our detriment? And what does Marvin Proman testify to? He testifies to the one thing that every defense counsel in this case has banged this lectern in emphasizing. No direct payments [to drivers]". (9942-3, 9972).

Then, after commenting that when apprehended by the F.B.I. in California during the trial of this case, Proman had a slip of paper with the name "Forrest" on it, the prosecutor discussed his questioning of Proman as to his means of support in California from January, 1974 to arrest by the F.B.I.:

> "He said a friend of his was loaning him money and he went through a whole discussion, how did you live, what money did you have? He never could answer that question. Why was he getting his support from Forrest this four-month period?" (9945-50).

No where in the record is there testimony that Gerry in any way supported Proman during his stay in California. To the contrary, Proman flatly denied any such support from Gerry (7968-9). And, although F.B.I. agent West testified - improperly, as previously noted - that when arrested in May, Proman stated to him that "someone suggested that I should take a vacation" (8150), there was no indication that Gerry had made this suggestion. Nor does the fact that when apprehended Proman had among his many papers, a writing with the name "Forrest" on it or Gerry's telephone number (7899, 7907-9), support the prosecutor's statement.

Here, as he did time after time throughout the trial, the prosecutor devastatingly undermined the fairness of the proceedings with wholly unwarranted and most inflammatory conduct.

Further, in discussing the Pullman tapes in his summation, the prosecutor, fully cognizant of both the tape revealing the F.B.I. "inspired" Kraft "fierce mob" testimony (5920) and the unsuccessful efforts of the defense to recall Kraft for cross-examination, argued:

> "Kraft wasn't recalled ... but yet the tapes are thrown up to you as some mysterious yardstick which you should listen to ... in the totality the tapes don't help the defense" (9918-20).

The prosecutor's summation grossly exceeded the limitations of permissible conduct and requires a reversal of the conviction.

J. The Court's Charge.

1. Introduction

After an eleven week trial, during which much of the

evidence was confusing - concededly, even to the court, and in which credibility was in such sharp dispute, the jury, quite understandably, and more than in the normal trial, looked to the court's charge for guidance. The charge, however, failed to do justice to Gerry. It is respectfully submitted, that viewed in its entirety, the charge contained such substantial defects as to constitute plain error. Fed. R. Crim. Proc. 52(a).

2. Gerry's Responsibility for Proman "Vacation".

In discussing Proman, the court charged:

> "You can consider agent West's testimony that Mr. Proman had told him in California that his Grand Jury testimony was truthful and that he had been told to take a vacation.
>
> Now, let me say here, there was reference to who would benefit by his taking a vacation. I do not think there is any evidence in the case to connect a particular defendant ... with that act. You can determine whether there is any significance to his having had Mr. Gerry's telephone number with him" (10,010-11).

Exception was taken to this instruction (10,074).

As stated previously, herein, at the time of Proman's arrest in California during trial he had numerous papers in his possession and among them was Gerry's telephone number (7899, 7907-9). Proman testified that he had this number in connection with transactions between Gerry and himself relating to the sale and purchase of horses (8026, 8032). There was no testimony whatsoever that Gerry had told Proman to go to California; Proman had denied that Gerry sent him money while he was there (7969).

Thus, the court's remarks here erroneously contrued the evidence and severely prejudiced Gerry by implying that Gerry had attempted to conceal evidence.

3. Instructions on the Law of Conspiracy.

The court instructed the jury:

> "The Government's theory is that Mr. Gerry was the central figure in a far-reaching conspiracy ... As I said, a member of a conspiracy does not need to know all the members. But still, if you find that there were several distinct conspiracies, then you have to acquit all the defendants except Mr. Gerry on the conspiracy charge" (10,002).

This confusing charge was erroneous because it assumed Gerry's guilt. The court in effect told the jury that no matter whether they found a single conspiracy or multiple conspiracies, as a starting point, Gerry was the central figure and was guilty of conspiracy.

4. Comments on the Testimony and Witnesses' Credibility.

Cumulatively, the courts comment on the evidence and on the credibility of witnesses was so heavily weighted in favor of the prosecution as to deny a fair trial.

Discussing the government evidence on the betting patterns and the F.B.I. charts prepared on the basis of these patterns, the court advised the jury that it could find the charts to be persuasive evidence of the existence of a conspiracy (10,000). Exception was taken to this charge (10,065). As previously discussed, Point I, Sections A and B, herein, this evidence failed to support such a conclusion. Moreover, as noted, the government's own witnesses - Shagan and Yaspan - negated such a conclusion.

Elsewhere, in discussing the guilt or innocence of drivers, the court's remarks appeared to assume Gerry's guilt.

The court stated:

> "Mr. Soerman [a member of the jury] asked yesterday why more drivers have not been indicted. That is not a matter which concerns this case. Apart from other drivers having been left out of betting patterns, we have not had a great deal of evidence here as to what their relations were with Mr. Gerry or their involvement in the bribes ..." (10,004).

The implication here was that a bribery scheme had been established with Gerry at the center and that the issue here was what relationship each driver had to Gerry.

In reviewing the issue of credibility of witnesses, the court strongly implied that such disputes should be resolved in favor of the prosecution. Thus, in regard to Pullman, the court stated:

> "You should consider the motives that Mr. Pullman may have had in carrying a tape recorder after he had talked with one of the defendants and his attorney and the fact that he had once agreed to plead guilty and now wanted to get a grant of immunity.
>
> One thing that I find interesting is that after all the assurances that the F.B.I. agent and Mr. Pollack gave Mr. Pullman about not going to jail he did not plead guilty and take his chances on the sentence I might impose but he insisted on being granted testimonial immunity and it was granted to him" (10,012-3).

Exception was taken to these instructions (10,068).

Here, the court cast suspicion on Pullman's recantation. Quite unsurprisingly, Pullman sought to obtain immunity rather than pleading guilty to the charge in question. But, because he did so, the court here belittled his recantation and disparaged his testimony favorable to the defense. Moreover, the court implied to the jury improper actions by Gerry and his

counsel in suggesting that Pullman wear a tape recorder. There was no basis for these remarks and they were highly prejudicial to Gerry.

Further in discussing credibility, the court virtually told the jury to disregard the recantations of the prosecution witnesses. The court charged:

> "Messrs. Proman, Pullman and Rothstein assert that the sworn testimony they gave before the grand jury was not true, and that they had been induced by the government to testify falsely.
>
> Of course the government had not right to offer false testimony, but recantation of sworn testimony is always open to a certain degree of suspicion and should be viewed with caution.
>
> The likelihood of seven witnesses being willing to tell lies that might put innocent people at risk of jail sentence is probably much less than the likelihood that one or two witnesses would do so. But anything is possible." (10,029); (emphasis added).

Defense counsel took strong exception to these remarks and in doing so, pointed out that the court had said seven witnesses had recanted (10,071). The court replied, "I didn't say that there were seven recanting witnesses" (10,071) and gave no further charge in this regard.

The jury's belief of the Proman, Pullman and Rothstein recantations was crucial to Gerry's defense. The unmistakable skepticism of the court in discussing these recantations - "anything is possible", and the misstatement as to the number of recantations - implying that there were so many as to render them all incredible, struck at the heart of the defense and incalculably prejudiced the jury as to Gerry.

Elsewhere in the charge, suggesting jury resolution of

the credibility conflicts against Gerry, the court charged:

> "It is unprofessional conduct for a prosecutor knowingly to offer false evidence or to fail to seek withdrawal of such evidence upon discovery of its falsehood" (10,014).

Although the canons of ethics preclude attorneys in a trial from expressing to the jury their belief on the issues [American Bar Association Code of Professional Responsibility DR7-106(C)] the court here, in effect, did this for the prosecution. The court articulated for the jury a prosecution belief in its own witnesses. This was erroneous.

In sum, for all of the above reasons, it is respectfully submitted the court's charge to the jury was so erroneous as to mandate reversal.

POINT II

PROSECUTORIAL MISCONDUCT REQUIRES THAT THE CONVICTION BE REVERSED AND THE INDICTMENT BE DISMISSED.

In Berger v. United States, 295 U.S. 78, 88 (1935) the United States Supreme Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In Point I, supra, the disclosure of prosecutorial and F.B.I. misconduct on tape recordings made by Pullman was discussed. As noted, these recordings reveal that the prosecutor and F.B.I. suggested to their witness, Kraft, following cross-examination of him on April 19, rehabilitation of his testimony by linking Gerry and Perry to organized crime. This conduct in itself warranted the granting of defendants' motion for a mistral based upon the disclosures in the tape recordings (5283). The court erred in denying that motion (5351, 5374).

However, compounding this misconduct, the prosecutor, after this April 19 rehabilitation conference with Kraft, then attempted to deceive the court about it. When questioned in court about it - prior to disclosure of the tapes to the prosecutor -both

the prosecutor and the prosecution witness denied it (4874-8, 4885-8, 4905-7).

In United States v. Ott, 489 F.2d 872 (7 Cir. 1973), the court reversed a conviction on the grounds of prosecutorial misconduct. The misconduct there concerned a failure to advise both the trial and appellate courts that one Allen was a government informant. Although acknowledging that "Allen's true status was arguably collateral" [id. at 875] to the issue before both courts, the Seventh Circuit excoriated the government for its deception, citing the American Bar Association's Final Draft of the Proposed Code of Professional Responsibility:

> "'Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal ... is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers'". id. at 874.

Here, the prosecutorial deception was not on an "arguably collateral" matter, but materially related to the credibility of a key government witness. Even more than in Ott does the prosecutorial lack of candor here require reversal.

Moreover, in addition to the foregoing improprieties, it is respectfully submitted that further prosecutorial and F.B.I. misconduct revealed on the Pullman recordings mandate not only reversal of the conviction but dismissal of the indictment.

These recordings were, as noted, made by Pullman in the prosecutor's office on April 18, 19 and 21 pursuant to a request by Gerry's attorney after Pullman had come to his office and related improper and coercive statements being made by the prosecutors to its witnesses (7285-6). Pullman at the time was

scheduled to testify as a government witness. Indicted in the instant case, he had his case severed by the prosecution with the expectation that he would plead guilty, testify for the government and be sentenced after trial. These recordings contain discussions between the prosecutor - Pollack, F.B.I. agents and Pullman regarding questions by Pullman as to whether he would be sentenced to imprisonment.

Specifically, during the April 18 recording, in efforts to assure Pullman that he would not be sent to jail, an F.B.I. agent asserted that "off the record" he "can guarantee" to Pullman that "there's no way you're gonna get screwed or do time" but that if asked whether the government made such a "deal" with Pullman, the government would have to deny this (App. D.32-3). When Pullman inquired whether "Pollack controls a little bit of what happens", an agent replied, "You bet your ass he does - sure" and adds that Pollack and Judge Judd were "close" (App., D 34-5).

Again on April 19, the agents instructed Pullman:

> "If they ask you on the stand, they say 'were any promises made to you?' And the answer is no, no promises were made to me" (App., D 116).

After the agents assured Pullman that he should not "worry" about his sentence, Pullman then asked: "In other words, you're saying you control the judge?" to which the agents replied that they and "Michael [Pollack] " controlled the judge (App., D 116-7). The following colloquy then occurred:

> "Pullman: So he can put my mind at ease on that. As long as you say you control the judge, it will help me. In other words, he's got him in his hip pocket.
>
> F.B.I. agent: In other words what - what Michael

> recommends when Michael goes to him and says this man's been cooperative, I recommend he receive no sentence, the judge says, 'You're right, Michael'" (App., D 117-8).

In a discussion with Pullman on April 19, Pollack, in an effort to impress Pullman that the trial judge and he had a joint interest in the outcome of the trial, asserted "He's going to give me just enough to what he thinks will get me a conviction" (App., D 91). On April 21, Pollack advised Pullman that in regard to Connie Rogers, who had originally been indicted in the instant case but whose case was severed, Pollack had discussed her sentence with Judge Judd with whom Pollack said he was "close" (App., D 214-5). Pollack stated that Rogers had received a two year sentence at his urging because he wanted her to testify as a prosecution witness (D 214-6). Pollack and Pullman then had the following colloquy:

> "Pollack: he [Judge Judd] tried to give Joe Bonnacoree a harsh sentence, and he was going to give Junior and Turcotte harsh sentences ...
>
> Pullman: Which you told him to do, prior to that -
>
> Pollack: Right.
>
> * * *
>
> Pullman: ... what you say he does.
>
> Pollack: He'll agree.
>
> Pullman: He jumps to the whip a little?
>
> Pollack: I'd say forty out of forty times.
>
> Pullman: Yeah. In other words you control him - that judge.
>
> Pollack: In this degree, as far as witnesses go. Yes. Yes." (App., D 216-7).

What a perversion of the obligation of the United States

Attorney to see that "justice shall be done", so well-expounded in Berger v. United States, is this prosecutorial and F.B.I. misconduct. But even more than gross prosecutorial misconduct is at stake here.* The tape transcripts reveal bald assertions by the prosecutor and the F.B.I. that the trial judge was under their control and part of the prosecutorial team. The point here is not that there was truth to these shabby allegations - they were denied by Judge Judd, a highly respected judge, and there is no basis whatsoever for crediting them. But rather, the significance is that they stain the appearance of justice, so fundamental to preservation of confidence in the actual administration of justice. Prosecutorial assertions of control over the judiciary, if unchecked, undermine the entire system. Truly, the remedy for such perversive conduct by the "United States Attorney ... the representative not of an ordinary party to a controversy, but of a sovereignty", Berger v. United States, supra at 88, is dismissal of the case in which that conduct occurs.

In United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974), this Court in determining whether an indictment should be dismissed, stated:

> "in this case we may rely simply upon our supervisory power over the administration of justice ... Clearly, this power may legitimately be used to prevent district courts from becoming willing 'accomplices in willfull disobedience

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*The New York Times of September 12, 1974 reported that after the trial, Judge Judd sent the tapes and tape transcripts to the Department of Justice as a result of which the prosecutor, Michael Pollack, was officially reprimanded by Attorney General William Saxbe.

> of law' ... Moreover, the supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process."

As in Toscanino, in the present case this court's "supervisory power over the administration of justice" should be exercised both to cleanse the court process of the prosecutorial pollution and, as a prophylactic measure, to deter such abuse in the future.

In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court, after years of frustrating experience with less drastic judicial remedies for police abuse of Fourth Amendment rights, reluctantly acted to deter such abuses by excluding from trial evidence obtained in violation of such rights. It is respectfully submitted that the only effective deterrent against such prosecutorial misconduct as occurred in the present case is a rule barring prosecution in such cases. Were the remedy for such abuse only a later reversal of conviction, that would be ineffective to deter prosecutorial misconduct in a close case, since, in the heat of a trial, the trial lawyer prosecuting a case might well be willing to take a chance on this sanction by the appellate court*.

Moreover, limiting the judicial remedy for prosecutorial misconduct to reversal of conviction would establish a lesser sanction against prosecutors - who are officers of the court - for their misconduct than the exclusionary rule fashioned by

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*A reprimand, such as that received by the prosecutor here from the Department of Justice, is surely of minimal consequence in deterring prosecutorial misconduct.

Mapp against the police for their misconduct. Surely, such a dual standard is detrimental both to effective law enforcement and the administration of justice. Accordingly, it is respectfully submitted that the conviction of defendant Gerry should be reversed and the indictment against him dismissed.

POINT III

INSOFAR AS APPLICABLE TO HIM, DEFENDANT-APPELLANT GERRY ADOPTS THE POINTS ARGUED BY DEFENDANT-APPELLANT PERRY.

CONCLUSION

For all the above reasons, it is respectfully submitted that the conviction of defendant Gerry should be reversed and the indictment should be dismissed.

Respectfully submitted,

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November 1, 1974

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS: SECOND CIRCUIT

USA,
Appellee,

against

FORREST GERRY, JR. and RICHARD PERRY,
Defendants-Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Karen Giles, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1013 East 180th Street, Bronx, New York

That upon the 26 day of November 1974, deponent served the annexed Appellant Brief upon David Trager attorney(s) for in this action, at 225 Cadman Plaza, New York, Brooklyn the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 25th day of November 1974

Karen Giles

Print name beneath signature

KAREN GILES

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975